(1) Supreme Court, U.S.
FILED
00-615 OCT 16 2000

No.

In the

Supreme Court of the United States

RICKEY C. BROOKS,

Petitioner,

versus

LARRY NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Q. Byrum Hurst, Jr.
Hurst Law Offices
Counsel of Record
213 Woodbine Street
Hot Springs, AR 71901
(501)623-2565

Curry & Taylor (202) 393-4141/ussupremecourt@hotmail.com

ZORP

QUESTIONS PRESENTED

Whether the time limitations under 28 U.S.C. 2244 is stayed when an act of nature prevents a prisoner from filing his action for post conviction relief - - violates the First and Fourteenth Amendments to the United States Constitution.

Whether the closing of the Bradley County, Arkansas, Courthouse on a regular business day (Monday-Friday) constitutes extraordinary circumstances beyond a prisoner's control, preventing him from necessary pleadings. Prisoners are entitled to equal protection of the law.

PARTIES TO THE PROCEEDING

Petitioner is a prisoner in the custody of the Arkansas Department of Correction. He had attempted to file post conviction relief procedures, under Rule 37 of the Rules of Criminal Procedure within the state of Arkansas. His petition was deemed untimely because the courthouse in which he was required to make the filing (Bradley County, Arkansas) had been closed on a regular business day, due to a weather-related event.

Respondent is the Director of the Arkansas Department of Correction.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Consitutional/Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Petition 3

Conclusion 8

Appendix

Circuit Court Opinion 1a

District Court Opinion 3a

TABLE OF AUTHORITIES

FEDERAL CASES

221 F. 3d 1341 1
Blasi v. Attorney General of Com. Of PA., 30 F. Supp. 2d 481 (M.D. Pa. 1998) 7
Calderon v. U.S. Dist. Court for the Cent. Dist. Of Ca., 128 F.3d 1283, cert. denied ____U.S.____, 118 S. Ct. 1389, 140 L.Ed.2d 648 (1998) 6
Calderon v. United States Dist. Court for the Cent. Dist. Of Ca., 127 F.3d 782, 786 (9th Cir. 1997), cert. denied ____ U.S. ____, 118 S.Ct. 1395 6
Davis v. Keane, 9 F. Supp. 2d 391 (S.D.N.Y. 1998) 7
Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-619(3rd 6
Paige v. United States, 171 F.3d 559, 561 (8th Cir. 1999) 6
S.Ct. 1028, 143 L.Ed.2d 38 (1999) 6
Shempert v. Hardwick Chem. Corp., 151 F.3d 793, 797-98 (8th Cir. 1998), cert. denied ____ U.S.____ 6
Texaco, Inc. v. Short. 454 U.S. 516. 102 S.Ct. 781, 70 L.Ed. 738 (1982) 7
Wilson v. Iseminger, 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed. 804 (1902) 7

FEDERAL STATUTES

28 U.S.C. 2244 ..... 3, 9
28 U.S.C. 2244(d)(2) 3, 6
28 U.S.C. Sec. 2244 3
28 U.S.C. Sec. 2244(d)(1) 1, 5

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eighth Circuit opinion (App. 1a) is unpublished and reported at 221 F. 3d 1341. The District Court opinion (App. 3a) is attached to this Petition and is unreported.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on July 18, 2000. The Court of Appeals entered an Order denying a timely petition for writ of habeas corpus. It reasoned because of the late filing of a state action, the provisions of 28 U.S.C. Sec. 2244(d)(1) prevented the filing of a writ of habeas corpus. Petitioner argued the time period should have been tolled as an ice storm had closed the courthouse during normal business hours on the day the post conviction relief motion was required to be filed.

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an argument of equal protection of the law guaranteed under the Fourth Amendment to the United States Constitution and applicable to the states by the Fourteenth Amendment.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted in a jury trial and sentenced to imprisonment in the Arkansas Department of Correction on June 29, 1994. Petitioner appealed and that direct appeal was denied by the Arkansas Court of Appeals. Petitioner then filed a pro-se petition for post conviction relief under Rule 37 of the Arkansas Rules of Criminal Procedure. The Petitioner had sixty (60) days to file his petition for post conviction relief, under Rule 37 of the Arkansas Rules of Criminal Procedure.

The petition for post conviction relief was due on February 2, 1996, and on that day an ice storm forced the closure of the Bradley County Circuit Clerk's office. The next business day was February 5, 1996, and on that date, the petition for post conviction relief was, in fact, filed.

The Circuit Court of Bradley County, Arkansas, did rule on the merits of the petition for post conviction relief. It was denied and Petitioner then appealed to the Arkansas Supreme Court. The Arkansas Supreme Court did not hear the matter on its merits and relied on a jurisdictional claim of untimeliness of the original petition in making its decision affirming the Trial Court.

On March 25, 1998, the Petitioner filed in the United States District Court, alleging inadequacies of counsel on a number of grounds.

The Respondent argued that the entire petition should be dismissed, because it was untimely under 28 U.S.C. Sec.

2244, which applied a one-year period of limitation on application for writ of habeas corpus. The Petitioner argues that he had filed a proper post conviction relief petition and that the provisions of 28 U.S.C. 2244(d)(2) requires tolling of the limitations because of his properly filed post conviction relief motion. Further, the Petitioner contends that his post conviction motion was erroneously deemed untimely by the Arkansas Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS DEPRIVED A PRISONER, WITHOUT READY ACCESS TO THE JUDICIAL SYSTEM, OF THE ABILITY TO FILE PLEADINGS WHEN COURTHOUSES ARE CLOSED ON REGULAR BUSINESS DAYS.

The Petitioner submits that he should not be prejudiced for acts of God preventing him from timely filing a post conviction relief drawn on a pro-se basis. The Petitioner obviously cannot control the weather and should not be held in prison without a means to get into the judicial system and utilize the established Rules of Criminal Procedure, due solely to the acts of God. Furthermore, the Statute of Limitations on filing a writ of habeas corpus found at 28 U.S.C. 2244 should be tolled during this period of time, in order to provide equal protection of the law, as guaranteed by the Constitution of the United States to all citizens, including prisoners within the Arkansas Department of Correction.

For most litigants, if a courthouse is closed on a regular business day, it is a rather routine and easy accomplishment to have their attorney or someone to come back the following day to determine whether the Clerk's office was open and

accessible for filing of pleadings. Not so, for incarcerated prisoners, who have to rely on the United States mail, within the institution, to be sent out on a regular and timely basis. The Petitioner was housed in an area far from Bradley County, Arkansas, and in order for him to file his pleadings, he had to assume them by United States mail and assume that they were reaching the office of the Clerk.

Rule 1.4 of the Arkansas Rules of Criminal Procedure provides that the deadline will be stayed when the office is closed and times will be computed by taking into consideration such closing. The rule states in part:

> For these rules, any statute governing procedure in criminal proceedings, or any court order entered in a criminal proceeding prescribes that a period of time of more than twenty-four (24) hours may or must intervene between events or acts, the day on which one (1) only of the events or acts occur shall be computed as part of the designed or designated period. When the first or last day of time period is a Saturday, Sunday, or state or federal legal holiday, it shall not be computed as part of the period, which shall run until the end of the next day, which is neither a Saturday, Sunday, nor a legal holiday. Whenever a party has the right or is required to take some action within a prescribed period, after service of notice or other paper, and such services allowed and made by mail, five (5) days shall be added to the prescribed period. *Kersh v. State,* 938 S.W.2d 569.

Although the Bradley County Circuit Court believed the petition was timely, the Arkansas Supreme Court, on an appeal of the petition, denied the appeal, stating that it was untimely and that untimeliness is jurisdictional and the appeal was denied.

A petition for writ of habeas corpus was filed April 16, 1998. The petition was denied in an Order dated August 30, 1999. The Petitioner filed a motion for certificate or Appealability on September 27, 1999, that was granted on November 9, 1999. It was from the August 30, 1999, Order that an appeal was lodged in the United States Court of Appeals for the Eighth Circuit. The appeal was denied in an Order dated July 18, 2000, stating that it was untimely. The Petitioner submits that 28 U.S.C. Sec. 2244(d)(1) clearly provides for a one-year period of limitations to file for a writ of habeas corpus from the latest of the following:

> "A) The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual

> predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

However, the statute does allow an in custodial individual to file a state petition for post conviction relief and provides that "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2). The Petitioner contends that his petition for post conviction relief was properly filed despite the Arkansas Supreme Court ruling and contends that the District Court should hear the cases on its face and not dismiss this matter on a procedural matter.

The Court has ruled on equitable tolling on several occasions. More specifically, "in the habeas context, equitable tolling is proper when "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Paige v. United States,* 171 F.3d 559, 561 (8th Cir. 1999); *Calderon v. United States Dist. Court for the Cent. Dist. Of Ca.*, 127 F.3d 782, 786 (9th Cir. 1997), cert. denied ____ U.S. ____, 118 S.Ct. 1395, 140- L.Ed. 2d 653 (1998); *Miller v. New Jersey State Dept. of Corrections,* 145 F.3d 616, 618-619(3rd Cir. 1998); and *Shempert v. Hardwick Chem. Corp.,* 151 F.3d 793, 797-98 (8th Cir. 1998), cert. denied ____ U.S.____ , 119 (S.Ct. 1028, 143 L.Ed.2d 38 (1999). Courts have found that extraordinary circumstances existed to permit equitable tolling of the Statute of Limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 when Defendant's lead counsel withdrew from representation after taking an out of state job. *Calderon v. U.S. Dist. Court for the Cent. Dist. Of Ca.,* 128 F.3d 1283, cert. denied ____U.S.____, 118 S. Ct. 1389, 140 L.Ed.2d 648 (1998). If any individual's actions can be considered beyond the control of an inmate,

then surely the acts of nature will carry those same limitations.

> It must be property conceded that all statute of limitations must proceed on the idea that the party has full opportunity afforded him to try his right in the Courts. A statute could not bar the existing rights of claimants without affording this opportunity, if it should attempt to do so, it not be a statute of limitations but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. 6

Texaco, Inc. v. Short. 454 U.S. 516. 102 S.Ct. 781, 70 L.Ed. 738 (1982); *Wilson v. Iseminger*, 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed. 804 (1902).

Properly filed petitions are tolled during properly filed post conviction relief procedures showing an encouragement to proceed with state remedies. *Davis v. Keane*, 9 F. Supp. 2d 391 (S.D.N.Y. 1998); *Blasi v. Attorney General of Com. Of PA.*, 30 F. Supp. 2d 481 (M.D. Pa. 1998). There is compelling evidence to show that the petition was properly filed. The Bradley County Circuit Clerk's Office was, in fact, closed on February 2, 1996. That evidence is a letter on the Bradley County Circuit Clerk stationery, signed by the Clerk of the Court, indicating that the Clerk's Office was closed, as stated by the Petitioner. The closing of the courthouse made it impossible for the Petitioner to file his petition. Rule 1.4 of the Arkansas Rules of Criminal Procedure provides that the deadlines will stay when the office is closed and time ill be computed by taking into consideration such closing. Therefore, the only possible interpretation of the Rule is that

the riling limitation that was initially cut short by the unusual closing of the Clerk's office was extended until the next business day. That there is ample case law that supports this claim. In *Bowen v. State*, the thirty (30) days to file an appeal fell on a day when the Court was closed and the time to file an appeal was extended until the next business day. 322 Ark. 483, 911 S.W.2d 555 (1995).

In the case at bar, the Petitioner had no control whatsoever as to the closing of the courthouse. He could not help the fact ice struck the area making it dangerous for employees to venture out. The Petitioner should not be punished and denied his rights to file habeas actions by the actions of the County Judge and acts of nature. That denial continues a fundamental injustice that would otherwise allow the Petitioner the right to have his claims raised in the neutral atmosphere of the United States District Court. Equitable tolling of the Statute of Limitations is the only proper decision.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Q. Byrum Hurst, Jr.
Hurst Law Offices
Counsel of Record
213 Woodbine Street
Hot Springs, AR 71901
(501)623-2565

(Any footnotes trail end of each document)

No. 99-4074

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Rickey C. Brooks,
Appellant,

v.

Larry Norris, Director, Arkansas Department of Correction,
Appellee.

June 16, 2000, Submitted
July 18, 2000, Filed

JUDGES: Before WOLLMAN, Chief Judge, BEAM, and BYE, Circuit Judges.

OPINION:

PER CURIAM.

Rickey C. Brooks petitioned for a writ a habeas corpus under 28 U.S.C. § 2254. The district court[1] found Brooks' petition was untimely filed, rejecting Brooks' contention that his federal statute of limitations was tolled during the pendency of his state post-conviction proceeding because the late filing of his state action was excused by an ice storm that closed the state court house on the last day he could file it. After carefully reviewing the record and the relevant law, we agree the petition was untimely and affirm the well-reasoned decision of the district court. See 8th Cir. R. 47B.

Footnotes

n1 The Honorable Garnett Thomas Eisele, United States District Judge for the Eastern District of Arkansas, adopting the report and recommendations from the Honorable Henry L. Jones, United States Magistrate Judge for the Eastern District of Arkansas.

No. PB-C-98-162

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Rickey C. Brooks,
Petitioner,

v.

Larry Norris, Director, Arkansas Department of Correction,
Respondent.

November 9, 1999

ORDER

Before the Court are Petitioner's Petition for Rehearing and his Petition for Appealability. The Court has carefully reviewed Petitioner's submissions and the record in this case. For the reasons stated herein, the Court will deny Petitioner's Petition for Rehearing and grant his Petition for Appealability.

I Petition for Rehearing

The Court may reconsider[1] a final judgment under Federal Rule of Civil Procedure 60(b), which provides that "[o]n motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for. . . (6) any other reason justifying relief from the operation of the judgment." Petitioner urges the Court to reconsider its August 27, 1999, order adopting United States Magistrate Judge Henry L. Jones, Jr.'s Revised Proposed Findings and Recommendations ("Findings"), contending that the Magistrate erred in his interpretation of the relevant statute and failed to consider an exception to the procedural

default doctrine. However, the Court has once reviewed and agreed with the Magistrate's Findings, and determined that they were

The Court sees no reason to depart from its previously issued order, will, therefore deny Petitioner's

Petition for Rehearing.

II. Petition for Certificate of Appealability

District Courts possess the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *Tiedeman v. Benson,* 122 F.3d 518, 522(8th Cir. 1997). To grant a certificate of appealability, the Court must find a "substantial showing" of the denial of a federal constitutional right. *Cox v, Norris,* 133 F.3d *565, 569* (8th Cir. 1997), *cert. denied* 1 19 S. Ct. 89, 142 L. Ed. 2d 70 (1998). A substantial showing is a showing that the issues are debatable among reasonable jurists, that a court could resolve the issues differently, or that the issues deserve further proceedings. *Id.*

Petitioner's writ of habeas corpus was denied by this Court, following the findings of the Magistrate, because it was not timely filed. Petitioner argued that it was timely filed since he had filed a Rule 37 petition in state court and that such petition tolled the running of the limitations period on his federal habeas claim. However, Respondent argued, and the Court agreed, that Petitioner's Rule 37 petition would not toll the running of the limitations period in light of the Arkansas Supreme Court's determination that his Rule 37 petition was untimely. The Magistrate explained the case thoroughly in his Findings:

> Petitioner asserts he "complied with all filing requirements" and his petition would have

been filed on time, but an ice storm forced the closure of the circuit clerk's office on Friday, February 2, 1996, the day the state petition was due. The next business day was February *5,* 1996, the day the petition was filed. Petitioner further asserts the Arkansas Rules of Criminal Procedure allow for the filing of a petition for post-conviction relief on the next business clay it the deadline for filing falls when the clerk's office is not open.

Where the highest state court decides a petitioner's claim has not been raised properly in a state proceeding, "that is the end of the matter." *Sweet v. Delo,* 125 F.3d 1144 (8th Cir. 1997), *cert. denied, Sweet v. Bowersox,* 118 S. Ct. 1197 (1998). Whether the petition was timely under the circumstances and in light of the state law was for the Arkansas Supreme Court to determine

A habeas court may apply "equitable tolling" to the limitations period where "'extraordinary circumstances' beyond aprisoner's control make *it* impossible to file a petition on time." *Paige v. United States,* 171 F.3d *559,* 561 (8th Cir.1999). Equitable tolling may be appropriate in a situation in which it is clear on the face of the record that a state court has made a factual mistake in the time computations and that its finding of untimeliness is erroneous. This is not the case here, however. Although Petitioner contends he mailed his petition on February 1, 1996, the record reflects his certificate of service was signed on February 2, 1996, and he signed and verified his petition on February *5,* 1996.... Since the [Arkansas Supreme Courtj} was aware of the circumstances, its ruling merely

> interpreted and applied state law, which is not something this court deems appropriate for review in deteiinining whether a state post-conviction petition was properly flled. No. PB-C-98-1 62, Doc. No. 21, pp. *5-7.*

Petitioner asserts that the confusion surrounding the filing of the Rule 37 petition, and the abundance of evidence that the Courthouse was closed due to the ice storm, gives rise to an appealable issue. Although the Court adopted and agrees with the Magistrate's Findings, it does find that Petitioner has made at least a showing that either the issues are debatable among reasonable jurists, that a court could resolve the issues differently, or that the issues deserve further proceedings. *Cox; 133* F.3d at *569.* As a result, the Court will grant Petitioner's Petition for Appealability.
IT IS THEREFORE ORDERED that Petitioner's Petition for Rehearing[2] be, and it is hereby,

DENIED.

IT IS FURTHER ORDERED that Petitioner's Petition for Appealability be, and it is hereby, GRANTED.

Dated this ___November, 1999.

Footnotes

[1]Although Petitioner couches his Motion as a Petition for Rehearing under Federal Rule of Appellate Procedure 40, it is more properly analyzed as a Motion to Reconsider under Federal Rule of Civil Procedure 60(b). Appellate Rule 40 only applies to the review of a decision of the United States Court of Appeals for the Armed Forces.in accord with the relevant law and facts of the case. Petitioner has not brought to the Court's attenton any new *facts* in support of his Motion, only a reassertion of a previously rejected position.

[2] Doc. No. 26
[3] Doc. No. 27